

In the Matter of
Expanding the Economic and Innovation
Opportunities of Spectrum Through Incentive
Auctions

To: The Federal Communications Commission

Docket No. 12-268

King Street Wireless, L.P. (“KSW”), by counsel and pursuant to the Commission’s Order of November 29, 2012¹, hereby submits its reply comments in the captioned proceeding.

KSW holds 152 700 MHz Block A and Block B licenses. KSW obtained these licenses through Auction No. 73. KSW is somewhat unique among 700 MHz licensees in that it has already complied with its interim construction obligations for the majority of the licenses that it holds. KSW is also somewhat unique in that it is among the few wireless licensees that is female controlled. Accordingly, KSW brings a unique small carrier prospective to this proceeding.

¹ *Order* in GN Docket No. 12-268, ___ FCC Rcd ___, rel. Nov. 29, 2012.

II. DISCUSSION

The Commission's Notice of Proposed Rulemaking in this proceeding² raised a number of questions regarding the reverse auction, allocation of licensed vs. unlicensed spectrum, and the rights and obligations of broadcasters – in addition to several matters involving licensed spectrum and the forward auction component of the incentive auction process. KSW's reply comments focus on a select group of topics in the last category.

A. The Commission should Structure the Forward Auction So That It, and the Wireless Industry Itself, Can be Competitive

It is beyond dispute that over the last several years the Wireless industry has become less competitive. A sound (and KSW submits persuasive) argument can be made that the industry is now simply not competitive. In this context, the FCC has itself been unable in its last two state of the Wireless industry reports to characterize the wireless industry as being competitive.³

However problematic is the state of competition in the Wireless industry generally, the situation is far more troubling when one considers only the best available spectrum, i.e., that which is below 1 GHz, including the 700 MHz Band that is virtually adjacent to the spectrum to be licensed in the captioned proceeding and which is the primary spectrum band for expanded licensed provision of broadband. See *Reply Comments of the 700 MHz Block A Good Faith Purchasers Alliance* in RM 11592, at 24. There it is explained that the two largest wireless carriers (a) hold 81% of all licensed paired 700 MHz spectrum and (b) made fully 90% of all payments for paired spectrum in Auction No. 73.

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 ("Notice").

³ See, e.g., *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report*, 25 FCC Rcd 1407, 11411-12 (2010).

If the Commission desires to restore (or arguably retain) some semblance of competition in Wireless spectrum below 1 GHz, and especially broadband wireless, the forward auction component of the incentive auction needs to be competitively open.⁴ Below King Street presents five recommendations that, if adopted, would assist the Commission in accomplishing this.

1. All Eligible Entities Should Be Entitled to Participate in the Auction, But None Should be Permitted to Totally Dominate It.

Auction No. 73 provides the Commission with a vivid reminder of what can happen when the Commission opens eligibility, but does not limit domination. There, the nation's two largest carriers totally dominated the auction. As noted above, together, they bought 90% of the licenses in the auction, as measured by auction revenues that were paid. And that followed one of those parties having, just prior to the auction, acquired a large portion of the previously allocated 700 MHz spectrum.⁵ Then AT&T swallowed up nationwide 700 MHz (unpaired) spectrum shortly after the auction.⁶

The Incentive Auction need not, and should not, proceed in that same manner. Several commenters have argued that those carriers who own more than a reasonable threshold amount of spectrum in 700 MHz should not even be eligible to participate in the incentive auction at all.⁷ Without either endorsing or taking issue with those proposals, KSW urges the Commission to give serious consideration to them and to (a) act as it reasonably determines necessary to meet its over-arching obligation to serve the

⁴ See Comments of the Competitive Carriers' Association, at 3, arguing that without genuine competitiveness the incentive auction could objectively only be viewed as a failure.

⁵ See In the Matter of Application of Aloha Spectrum Holding Company LLC (Assignor) and AT&T Mobility II LLC (Assignee) Seeking FCC Consent For Assignment of Licenses and Authorizations, WT 07-265, 22 FCC Rcd 2234, *Memorandum Opinion & Order* (2008).

⁶ See *Application of AT&T and Qualcomm Incorporated*, 2d FCC Rcd 17589 (2011).

⁷ See Comments of the CCA, at 8; Cellular South, at 5; and Leap Wireless, at 7.

public interest by fostering competition and (b) complying with its statutory mandate to license auctioned spectrum to a diverse and wide group of applicants.⁸

Should the Commission determine that its statutorily mandated obligations can best be met by defining initial eligibility broadly, the Commission then must determine how to prevent very broad eligibility to participate from realistically and effectively crushing others' opportunity to compete effectively in the auction – and the Commission's very ability to comply with its governing statute.

The Commission wrestled with this very same question in prior wireless auctions. See Auctions No. 11 and 22. There the Commission found that the public interest would be best served if no single eligible entity was permitted to obtain more than 10% of the licenses included in the applicable auctions.⁹ The result was that the licenses were widely distributed, and no single licensee acquired more than ten percent of licenses.

KSW urges the Commission to take this same type of approach in the upcoming incentive auction. The Commission could structure its limits as it did before (i.e., with a “cap” set at a very small percentage of total licenses available in the auction, but with each market counting the same as each other market in terms of cap calculation.) Alternatively, the Commission could limit winning bidders by the overall percent of MHz/pops or percentage of revenue generated in the auction. For example, if the maximum percentage of MHz/pop assigned through the auction that any single carrier

⁸ See 47 USC§409(j)(3), which mandates that the Commission, in conducting spectrum auctions, “avoid excessive concentration of licenses” by assigning licenses to “a wide variety of applicants, including small business, rural telephone companies and businesses owned by members of minority groups and women”.

⁹ See Section 47 CFR§24.710; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, PP Docket 93-253, 9 FCC Rcd 5532 (1994) (“*Competitive Bidding Fifth Report and Order*”), *recon.* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket 93-253, 10 FCC Rcd 403 (1994) (“*Competitive Bidding Fifth Memorandum Opinion and Order*”), *erratum*, 60 Fed. Reg. 5333 (Jan. 27, 1995).

could obtain were limited to 30%, there may be no need to limit initial eligibility more rigorously;¹⁰ the Commission could meet its Section 309(j)(3) statutory mandate; there would be no need for an absolute bar to eligibility; and no single entity could legitimately complain about being unfairly limited to the amount of spectrum that it could obtain through the auction.

2. The Commission Should Make It Clear, Upfront, That All Licensees Must Comply with Interoperability.

The second major shortcoming of the otherwise generally successful Auction No. 73 was the absence of any express obligation for interoperability. In the context of Auction No. 73, that omission was somewhat understandable. After all, nearly thirty years earlier, the Commission expressly mandated interoperability.¹¹ And at all times after that, until after the close of Auction No. 73, the industry adhered to that eminently reasonable obligation. (It was only after Auction No. 73 that the two largest carriers violated that policy.) Nevertheless, the absence of an express interoperability mandate has stirred controversy for more than three and one-half years.¹² The Commission now has an opportunity to assure that this problem does not reoccur, and it should expressly mandate interoperability in the incentive auction.¹³

¹⁰ See Comments of United States Cellular Corporation (“USCC”), at iii, calling for a 25% cap on acquisition of available spectrum by any single bidder.

¹¹ *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79-318, 86 FCC 2d 469, 46 Fed. Reg. 27655 (1981).

¹² See RM 11592 and WT Docket No. 12-69, both of which were initiated by a Petition for Rulemaking submitted on September 30, 2009.

¹³ Many commenters agree. See Comments of Cellular South, at 8; Leap Wireless, at 7; and USCC, at ii.

3. The Commission Should License the 600 MHz Band on Both a CMA and EA Basis.

The Commission has repeatedly recognized that various market sizes present different advantages.¹⁴ Among other things, small markets are particularly critical to small bidders, who generally have less access to capital – it provides them with a reasonable chance to succeed at auction. As a result, in recent auctions, including Auction No. 73, the Commission has properly licensed different bands in different market sizes. Given the need to improve the recent disappointing small business performance in auctions, this strategy appears to be particularly critical and should be applied in the incentive auctions.¹⁵

4. The Commission Should Keep the Auction Simple, and Fair, By Not Adopting Package Biddings.

One of the over-arching comments in this proceeding has been to keep it simple.¹⁶ One way to maintain simplicity is not to include package bidding, and KSW urges the Commission to utilize that strategy.

Another reason to avoid package bidding is to make the auction more even-handed, and fairer to small businesses. In this regard, two matters are uncontested.¹⁷ The first is that package bidding provides an advantage to larger bidders. That is eminently logical, since only larger carriers have the access to capital necessary to take advantage of

¹⁴ See, e.g., Lower 700 MHz R&O, 17 FCC Rcd, 1022, 1061 (2002).

¹⁵ Several smaller carriers also urged the Commission to take this approach. See Comments of USCC, at i; CCA, at 14-15; and Leap, at 4.

¹⁶ See, e.g., Comments of CTIA calling for transparency and simplicity (“lack of complexity”), at 3.

¹⁷ See Comments of USCC, at 5 and Leap, at 9.

this option. It also explains, in part, why Auction No. 73 (where package bidding was permitted) was so clearly dominated by the largest bidders.

5. The Commission Should Increase the Size of Bidding Credits Available.

During the nearly two decades that have transpired since the Commission first became empowered to license by competitive bidding, there have been changes in the magnitude of possible bidding credits and to the ability of smaller bidders to compete in the auction process. Not surprisingly, there has been a positive and largely direct correlation between the size of available bidding credits and the success of small bidders in auctions.

Early on, there were three tiers of bidding credits: 35%, 25% and 15%. Subsequently, the Commission abandoned the 35% bid credit. That well-intended change reflected only the fact that there genuinely were issues in the DE program in need of correction. But these issues involved, for the most part, the provision of loans to DE Applicants. They did not involve the magnitude of bidding credits. Significantly, the Commission moved promptly and correctly to resolve the genuine issue. As such, the problems that were in need of correction have been addressed, and the issue never was the level of bidding credits available. For these reasons, and given the need to increase opportunity for small businesses, the 35%, level of bid credits should be reinstated.¹⁸

¹⁸ At least one other party, Council Tree Investors, Inc., requested that bid credits be set even higher, at 40%. Comments of Council Tree, at 3, there also properly noting that a successful DE program is essential to the Commission complying with its Section 309(j)(3) mandate.

III. CONCLUSION

The Incentive Auction presents a tremendous opportunity to enhance wireless broadband capability, and competition in the wireless industry generally. In order for the incentive to achieve their potential, the five recommendations set forth herein should be adopted.

Respectfully submitted,

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